

FEDERAL CIRCUIT COURT OF AUSTRALIA

HUYNH v MINISTER FOR IMMIGRATION & ANOR [2014] FCCA 1037

Catchwords:

MIGRATION – Application for judicial review – Partner (Temporary) (Class UK) visa – denial procedural fairness – discretion unreasonable – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 5F, 5CB, 359A, 353, 420, 375A, 5F(3), 353(2)(b), 360, 357A, 359A(4)
Migration Regulations 1994, R1.15A, R1.09A, R1.15A(3), cl.820.211(2)(a), cl.820.11(1)

Cases cited:

Minister for Immigration and Citizenship v Li [2013] HCA 18
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Ozbunbar v Minister for Immigration & Anor (1998) 55 ALD 163
Minister for Immigration & Ethnic Affairs v Wu Shang Liang (1996) 185 CLR 259
Abebe v Commonwealth (1999) 197 CLR 510
Minister for Immigration & Citizenship v Chamnum You [2008] FCA 241
SZINP v Minister for Immigration & Citizenship [2007] FCA 1747
Tefonu Pty Ltd v Insurance & Superannuation Commissioner (1993) 44 FCR 361
Attorney-General for the State of New South Wales v Quin (1990) 170 CLR 1

Applicant:	DANG HUONG KHANH HUYNH
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 1281 of 2013
Judgment of:	Judge Jones
Hearing date:	26 March 2014

Date of Last Submission: 28 April 2014
Delivered at: Melbourne
Delivered on: 20 August 2014

REPRESENTATION

Counsel for the Applicant: Mr Fernandez
Solicitors for the Applicant: T A Fernandez
Counsel for the Respondents: Ms Wende
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The application filed 14 August 2013 is dismissed.
- (2) The applicant pay the first respondent's costs in the amount of \$5,800.00 within 28 days of these orders.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1281 of 2013

DANG HUONG KHANH HUYNH

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, Dang Huong Khanh Huynh, seeks Judicial Review of a decision by the Migration Review Tribunal (“the Tribunal”) dated 7 July 2013, affirming a decision of a delegate of the Minister For Immigration and Border Protection (“the Minister”) dated 15 December 2011 not to grant the applicant a Partner (Temporary) (Class UK) visa (“the visa”).

Background

2. The applicant is a citizen of Vietnam. She arrived in Australia on 26 January 2008 as the holder of a Subclass 573 Student (Temporary)

Higher Education Sector (Class TU) visa which was valid until 2 July 2008. On 26 October 2010 the applicant was granted a Subclass 572 Student (Temporary) Vocational Education and Training Sector visa which was valid until 15 March 2012.

3. Mr Cong Tam Dinh, the applicant's sponsor, is an Australian citizen. The applicant and Mr Dinh married on 26 June 2011. The applicant applied for the visa on 29 June 2011 (CB 1 to 51).
4. It is relevant to note that in August 2011 the (then) Department of Immigration and Citizenship received community information from a source alleging that the applicant and sponsor were in a contrived marriage, that the applicant was living at the applicant's sister's house and not the residential address of the sponsor and that the sponsor was creating fake evidence around the sponsor's house to pretend that the applicant was living with him (CB 126). An unannounced home site visit was conducted on 17 November 2011 by Departmental Officers at both nominated addresses contained in the community information. A handwritten and transcribed record of the site visit is at CB 75 to 114.

Applicable law

5. The visa sought by the applicant contains one Visa subclass, Subclass 820 (Partner). The criteria for a Subclass 820 visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 ("the Regulations"). The primary criteria to be satisfied at the time of application are that the applicant is not the holder of a Subclass 771 (Transit) visa and that she meets one of the alternative requirements set out in cl.820.211 of the Regulations. Given the applicant's claimed circumstances, the relevant criteria she was required to satisfy for the grant of the visa is set out in cl. 820.211(2)(a). In summary, these are that at the time of application the visa applicant be the spouse or de facto partner of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. The primary criteria to be satisfied at the time of decision are that the visa applicant continues to meet the requirements except where the sponsoring partner has died, or the relationship has ceased and either relevant family violence has occurred or the visa applicant and sponsor have legal obligations to a child: cl.820.211(1).

6. Section 5 of the Migration Act 1958 (“the Act”) states that “spouse” has the meaning given by s.5F of the Act, which provides:

*“(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.”

7. Regulation 1.15A of the Regulations makes further provisions for the purposes of s.5F(3). It provides that the Minister “*must consider all of the circumstances of the relations **including** (emphasis added) the matters set out in sub-regulation (3)*”. The matters set out in sub-reg (3) are:

“(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

- (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
- (iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*
- (v) *the basis of any sharing of day-to-day household expenses; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married to each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one."*

8. If a couple are not in a married relationship, s5CB sets out the considerations for determining whether they are in a de facto relationship for the purposes of s.5 of the Act. These considerations are

the same as those specified in s.5F. Additionally, regulation 1.09A is in the same terms as regulation 1.15A.

Tribunal Proceedings and Decision

9. An application for review was made to the Tribunal on 29 December 2011 (CB 1342140). In the application the applicant nominated her representative as Dr Tung-Bao Ngo, a migration agent. On 21 December 2012 the Tribunal invited the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review (CB 147 to 148). By correspondence dated 24 December 2012, Dr Ngo, on the applicant's behalf, sent a submission to the Tribunal which addressed relevant criteria, including background of the relationship, financial aspects of the relationship, nature of the household, social aspects of the relationship, nature of the persons commitment to each other together with supporting documentation (CB 150 to 166).¹ By correspondence dated 14 January 2013, Dr Ngo sent to the Tribunal statutory declarations sworn by the applicant's brother-in-law and friends of the sponsor, together with supporting documents (CB 168 to 198). Following an adjournment of the hearing by the Tribunal, Dr Ngo forwarded by letter dated 18 January 2013 further supporting documentary material to the Tribunal (CB 27 to 210).
10. The applicant appeared at the hearing, together with Dr Ngo and two witnesses, the sponsor and the applicant's sister. In the course of the hearing the Tribunal asked whether the applicant wished to have an opportunity to respond to inconsistencies in writing which had been put to the applicant orally during the course of the hearing to the Tribunal during the hearing the Tribunal member asked the applicant if she wanted the Tribunal to put in writing all the inconsistencies. The applicant responded that she did.²
11. Pursuant to section 359A of the Act, by correspondence dated 21 February 2013, the Tribunal invited the applicant to comment on or respond to certain information which the Tribunal considered would, subject to the applicant's comments or response, be the reason, or part

¹ It is to be noted that by correspondence dated 30 December 2012 Dr Ngo advised the Tribunal as to inadvertent errors in the submission and requested they be corrected in accordance with the amendment set out in the correspondence (CB 167).

² Supplementary Court Book at transcript p. 32.

of the reason, for affirming the decision under review (CB 217 to 224). It is appropriate, given the grounds for judicial review articulated by the migration agent at the hearing (see below) to set out the following extracts from that invitation (CB 217 to 218):

“The particulars of the information are:

- *As put to you at hearing, correspondence on file dated 15 August 2011, indicates that the Department received “dob-in” information from someone who had gleaned from over-hearing conversations between family members that you and the sponsor at the time of making the allegation had never lived together. This allegation then led the Department to conduct a site visit to a residence where you were staying, as well as to the residence of your sponsor (details set out below). The allegation also comprised the following:*
 - *That you had a valid student visa but that this was due to expire. You then changed your course because hair dressing was not on the skilled list;*
 - *To remain in the country you became involved in a contrived marriage to obtain permanent residency;*
 - *You and the sponsor travelled overseas to get married so that you would be able to provide the Department with photographs and evidence of a wedding having taken place;*
 - *You and your sponsor parted ways as soon as you returned to Australia;*
 - *You and your sponsor at the time the allegation was made had never lived together; and*
 - *The sponsor was creating “fake evidence” around his house to pretend that you and he were living together.*

The source of the allegation was also able to accurately name your current representative and provided his details.

This information is relevant to the review because whilst the Tribunal ordinarily places little, if any, weight on “dob-in” information, it may find that in conjunction with other concerns it holds about the limited contemporary evidence submitted at the time of application of you both living in a spousal

relationship pursuant to Regulation 1.15A, that you have entered into a contrived marriage to be able to remain in Australia.

If the Tribunal relies on this information in making its decision, it may find that the information submitted as “dob in” information is consistent with the limited evidence of the existence of a genuine and continuing spousal relationship, including cohabitation, as per Regulation 115A prior to the site visit by the Departmental officers on 17 November 2011.”

12. The Tribunal then specified the inconsistencies it had identified following from the site visit record, the relevance of the information and the consequences of the Tribunal relying on this information. The Tribunal also alerted the applicant to its concern that the sponsor had not provided evidence that he had indeed validly divorced his second wife.
13. By correspondence dated 18 March 2013, Dr Ngo forwarded to the Tribunal a statutory declaration of the applicant together with various medical documents (CB 225 to 229).
14. The Tribunal commenced its decision made on 17 July 2013 by setting out the relevant law and stating (CB 272 at [10]):

“The principal issue in the present case is whether the applicant is the spouse or de facto partner of the sponsor at the relevant time.”

15. The Tribunal proceeded to set out the claims and evidence stating (CB 272 at [14]):

“The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate’s decision, and other material available to it from a range of sources.”

16. In its decision record the Tribunal set out the concerns it expressed to the applicant in relation to the evidence and information arising from the site visit:

0 it stated it had concerns that the relationship between the applicant and the sponsor may have been arranged and did not start off as a spontaneous one as claimed (CB 274 at [31]);

- 1 the Tribunal questioned the applicant and sponsor about their future commitment including, “*whether it was a joint life plan that they would have a child.*” The Tribunal told the applicant it thought that the visa applicant was being evasive in her answers (CB 275 at [36],[38]);
- 2 referring to the applicant’s evidence that she stayed at her sister’s house on Wednesdays and Thursdays, the Tribunal noted that this arrangement did not appear to be conducive to married life (CB 276 at [42] to [43]);
- 3 the Tribunal read out the report of the immigration officials (the site visit record) and stated that, “*the visa applicant’s comments at hearing could indicate that she was being evasive and refusing to acknowledge the information presented by the Department.*” (CB 276 at [47]);
- 4 The Tribunal noted that there was little evidence of the sponsor and the applicant living in the nominated residential home as spouses (CB 276 at [49] to [51]).
17. The Tribunal set out the evidence given by the sponsor and recorded that it had stated to the sponsor that, “*it appeared that the parties revised their account after the (site) visit to explain away why the visa applicant refused to open the door to the officers.*” (CB 278 at [61]) The Tribunal noted that it set out the “*substance and detail of the allegation submitted to the Department on 15 August 2011, which centred on the visa applicant having entered a fraudulent marriage in order to gain permanent residency.*” (CB 276 at [63]).
18. The Tribunal recorded its findings and reasons for its decisions having regard to the matters specified in regulation 1.15A (3) as follows:
 - a) *the financial aspects of the relationship* – the Tribunal referred to the submissions made on behalf of the applicant and the evidentiary material provided by the applicant to the Tribunal (CB 287 at 76] to [87]). The Tribunal accepted that there was evidence of a joint account in both names at the claimed marital home in Springvale. However, it was “*not satisfied that such evidence, amongst the other financial evidence, points to the parties having*

lived in a genuine and continuing spousal relationship since their marriage date in June 2011... “ (CB 289 at [88]) The Tribunal found that, “given the vague evidence concerning the parties living arrangements and a limited evidence of the parties sharing their finances for their living arrangements at the Springvale address, the Tribunal is not satisfied that the parties financial aspects of their claimed spousal relationship are consistent with two persons who share their day-to-day living expenses as contemplated by regulation 1.1 5A.” (CB 289 at [91]);

- b) *the nature of the household* – the Tribunal accepted that the applicant had submitted a joint account and other taxation material which it observed might constitute evidence that the parties shared residence. However, it found that given its concerns about the inception and development of the relationship between the applicant and the sponsor and the vague evidence given at the hearing in relation to this, it was not satisfied that such evidence alone was indicative of the parties having lived in a genuine and continuing spousal relationship (CB 289 at [92]). The Tribunal made it clear that whilst it did not rely on the allegations leading to the site visit, it took into account the record of the site visit made by the departmental officials, including the information provided by the sponsor in relation to the applicant’s absence from the claimed marital address and the record of the site visit at the applicant’s sister’s home. The Tribunal also took into account the applicant’s explanations about her absence but was not satisfied that the applicant was at work at the time of the site visit at the applicant’s sister’s home (CB 290 at [93] to [106]). The Tribunal stated that it placed significant weight on the evidence found by the departmental officers at the claimed marital address which indicated that the visa applicant was not living there on an on–off basis. *“On the contrary, the evidence pointed to her living away from the claimed marital home on a permanent basis.”* (CB 292 at [107]). The Tribunal found that on the evidence of the site visit undertaken on 7 November 2011, and in light of other limited evidence that would demonstrate the applicant and sponsor had a shared household, it was not satisfied that the parties’ household arrangements were consistent with two persons living in a genuine and continuing spousal relationship

(CB 292 at [108]. The Tribunal also was not satisfied that the evidence of shared living arrangements overseas in Vietnam for several weeks indicated that the parties were in a genuine and continuing spousal relationship (CB 292 at [109]);

- c) *The social aspects of the relationship*- the Tribunal referred to the statutory declarations provided by the applicant from the sponsor's friend, the applicant's brother-in-law and his friend. It found that given the strong adverse findings the Department made in respect of the living arrangements of the parties, the declarations were not compelling evidence that would contest the findings of the Department (CB 292 at [111]). The Tribunal expressed concerns about the photographic evidence provided by the applicant and whether it was contrived (CB113 at [114] to [121], CB 294 at [121]). It noted the absence of any evidence from the sponsor's children whom the applicant had stated she had not yet met (CB 293 at [112]). The Tribunal stated it was not satisfied, *"that the parties are seen by the community at large as being in a genuine and continuing spousal relationship. The evidence submitted in this regard is limited and confined mostly to the system of the visa applicant and her family as well is that of the sponsor and his family and friends, but there is silence as concerns the sponsors' children as to what their views on the relationship might be."* (CB 294 at [120]);
- d) *the nature of the commitment to each other* - the Tribunal found that it had difficulty at the hearing and from the evidence submitted in gauging whether the parties shared a joint vision of their future life together. It referred to the confusing evidence of the applicant and sponsor in relation to future plans to have children (CB 294 at [123] to [124]). The Tribunal stated (CB 294 at [125])

"Over the space of several years, the Tribunal would have expected that, had the parties been in a genuine and continuing spousal relationship, there would have been able to point to plans and aspirations for their future together. Given the limited evidence in this regard it would appear that the visa applicant's sole aim is to achieve residency in Australia."

19. The Tribunal also noted that the sponsor had supplied a copy of the divorce order for his first marriage but not the second marriage. It stated, “*the Tribunal has serious concerns, despite finding that the relationship between the parties is not genuine and continuing that the marriage between the parties has never been valid in any event.*” (CB 295 at [126]).

20. Judicial Review

21. The hearing of the application for judicial review was listed for 26 March 2014. By email dated 25 March 2014 sent to my Chambers, the applicant’s representative, Mr Fernandez, requested an adjournment of the hearing on the grounds that, “as I have a mobility disorder and unable to attend Court tomorrow.” On the day of the hearing, Mr Fernandez was contacted on his telephone number recorded on the Court file. He informed the Court that he was in a position to appear by telephone conference for the application and the hearing proceeded.
22. At the completion of the oral submissions by Counsel for the first respondent, Mr Fernandez stated that he had been unable to clearly hear those submissions. A copy of the transcript of the oral submissions by Counsel for the first respondent was later forwarded to Mr Fernandez to enable him to provide written submissions in reply on behalf of the applicant. Submissions were forwarded by Mr Fernandez, on behalf of the applicant, by email dated 28 April 2014.
23. The applicant commenced proceedings in the Federal Circuit Court on 14 August 2013. The application contains three grounds of review. Each of these are dealt with below.

Ground One - denial of natural justice/procedural fairness

24. The applicant’s first ground for judicial review was:

The applicant was denied natural justice/procedural fairness when the Tribunal said “and other material available to from a range of sources” without identifying what the other range of sources were.”

25. This ground of review refers to the statement by the Tribunal at [14] of its decision (see [15] above).

26. Mr Fernandez stated, in oral submissions, that the failure to identify, “the range of sources” offended s.353(2)(b) which provides that in reviewing a decision the Tribunal shall act according to the substantial justice and merits of the case. He submitted that the Tribunal did not act according to the substantial justice and merits of the case and, in doing so fell into jurisdictional error.
27. There are two aspects to the submissions made in relation to Ground One. The first is that the Tribunal failed to identify in its decision the “other range of sources.” Secondly, this failure had the consequence that the Tribunal did not review the delegate’s decision according to the substantial justice or merits of the case in breach of s.353 of the Act.
28. Turning first to the applicant’s claim that the Tribunal failed to identify in its decision the “other range of sources.”
29. I agree with the submission of the first respondent that all documents that formed part of the decision were identified in its reasons. There is nothing in the Tribunal’s reasons which indicates that it relied on any material that was not disclosed to the applicant either during the hearing or in the invitation to comment of 21 February 2013.
30. As to the applicants submission that a failure by the Tribunal to conduct its review in accordance with s.353 of the Act, this argument was considered by the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 (“*Li*”). His Honour French CJ stated at [12] (footnotes omitted):

“Section 420 of the Act gives the same legislative directions to the RRT as s.353 gives to the MRT. The direction in subs (1) of each provision is, as was said in SZGUR, a “requirement imposed on the Tribunal, in the discharge of its core function”. That requirement is formulated in terms of broad legislative objectives which are, to some degree, “inconsistent as between themselves.” They are not expressed in terms or in a context which would support a claim of jurisdictional error based on the non-observance of any of them. That view is well supported by observations about s.420 in the judgments of this Court in Minister for Immigration and Multicultural Affairs v Eshetu. There was a focus in that case on the interaction between s.420 and the limited grounds for judicial review of Migration Act decisions in the Federal Court which were enumerated in s.476

as it then stood. Nevertheless, it was the broad facultative language of s. 420 that supported the conclusion that it did not give rise to grounds for judicial review based on a failure to comply with its exhortations. Gleeson CJ and McHugh J described its function as “intended to be facultative, not restrictive” and “to free Tribunals, at least to some degree, from constraints otherwise applicable to Courts of law, and regarded as inappropriate to Tribunals.” Gaudron and Kirby JJ described s.420 as determining the general nature of review proceedings and held that there was no basis for concluding that it operated to mandate specific procedures to be observed by the RRT or the method by which it was to reach its decision. Gummow J agreed with what Lindgren J had said, particularly about s.420(1), in Sun Zhan Qui v Minister for Immigration and Ethnic Affairs. Lindgren J pointed to the difficulty of invoking a failure to comply with s.420(1) as a ground of non-performance of a requisite procedure for the purposes of s.476 of the Act. Although his analysis was based upon the interaction with s.476, it threw up the general difficulty of invoking s.420(1) and similarly s.353(1) as giving rise to grounds for judicial review. A complaint about alleged non-compliance with s.420(1) might require consideration of the RRT’s staff and financial resources and its internal organisations and practices. His Honour said:

“A mere conclusion that a mechanism of review in its operation in a particular case did not satisfy one or more of the epithets in [s] 420(1), would not necessarily establish that the [Tribunal] had not been pursuing the specified objective.”

31. I am satisfied that failure to comply with s.353 of the Act does not provide grounds for judicial review.
32. Accordingly, I find that this ground for judicial review does not give rise to jurisdictional error.

Ground Two – Breach of s.353 and s3575A

33. The applicant’s second ground for judicial review was:

The Tribunal has breached ss.353 and 375A of the Migration Act when the Tribunal observed the circumstances under which the Applicant met her sponsor, starting a family and the site visit by the Department, the reasons why the Tribunal is of the view that there was no financial aspect of the relationship, the nature of the household, the social aspect of the relationship, when the

Tribunal said “this unease is re-enforced by the fact the parties have photographed themselves in shopping centres, as well as in bed, fully clothed and the nature of the commitment to each other.””

34. I have earlier dealt with a breach of s.353 of the act as ground for judicial review (see [28] to [29] above). It is tolerably clear, from the written submissions in reply that the applicant intended to refer to s.375A not s.357A of the Act.
35. This section provides that Division 4 of Part 5 of the Act sets out an exhaustive statement of the natural Justice hearing rule. Part 5 of the Act governs the conduct of reviews of reviewable decisions by the Tribunal. In my opinion, having regard to the reasoning in *Li*, the exhortation contained in s.357A is not susceptible to a claim that its provisions have been breached. This is to be distinguished from a claim that one of the provisions which mandate the Tribunal to act in a certain way stop for example, a failure to comply with the s.360 of the Act will give rise to jurisdictional error.
36. Mr Fernandez submitted that what was intended by this ground of judicial review is that it is plainly evident from the Tribunal’s decision record; in particular, at paragraphs the [108] to [109] and [111], as well from the transcript, commencing page 8 at point 18 onwards, that the weight given by the Tribunal to the record of the site visit in 2011 was such as to unreasonably overshadow all other considerations. The applicants written submissions in reply states:
37. *“As the first respondent solicitor correctly said “considered a great deal of evidence provided by the applicants”. This is not borne out by the decision of the MRT as I submitted earlier the entire decision on the transcript is permeated by the site visit.”*
38. The submission of the applicant is that the weight given to the record of the site visit in 2001 made by departmental officials overwhelmed the consideration by the Tribunal of its consideration of the applicant’s evidence. As such the decision of the Tribunal was unreasonable. It is settled principle, subject particular exceptions, that the weight to be given to evidence before the Tribunal is a matter for the Tribunal not the Court: *Minister for Immigration and Citizenship v Applicant A125*

of 2003 [2007] FCAFC 162 at [95]. In *SZINP v Minister for Immigration and Citizenship* [2007] FCA 1747 at [29], Collier J stated:

“While the appellant may feel that insufficient weight was ascribed to evidence which he considered important, it is clear that:

5 the weight given by the Tribunal to evidence before it, both oral and written evidence, is a matter for the Tribunal in its role as the arbiter of fact: Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259, and

6 if the Tribunal made an error of fact, it is not a jurisdictional error if there is some evidence upon which the finding of fact could be made: Epenisa v Minister for Immigration and Multicultural Affairs [2007] FCA 80 at [36], Abebe v Commonwealth [1999] HCA 14; (1999) 197 CLR 510.”

39. There is an exception to this general rule where the Tribunal’s decision is manifestly unreasonable. In *Tefonu Pty Ltd v Insurance & Superannuation Commissioner* (1993) 44 FCR 361 per Beazley J stated at 374:

“The weight which is to be given to a relevant factor is a matter for the Tribunal, unless it can be said that the Tribunal’s decision is manifestly unreasonable. (Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 41; Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 230, 233-234).”

40. In *Attorney – General for the State of New South Wales v Quin* (1990) 170 CLR 1 it is stated at p.36:

“... Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: Nottinghamshire County Council v. Secretary of State for the Environment.”

41. The Court refers to the following passages in *Attorney – General for the State of New South Wales v Quin* (1990) 170 CLR 1 at pp.35 to 36:

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law

which determines the limits and governs the exercise of the repository's power. If, in so doing, the Court avoids administrative injustice or error, so be it; but the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

There is one limitation, "Wednesbury unreasonableness" (the nomenclature comes from Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: Nottinghamshire County Council v. Secretary of State for the Environment. Acting on the implied intention of the legislature that a power be exercised reasonably, the Court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined."

42. There is no doubt that the Tribunal gave significant weight to the record made by the departmental officers of the site visit conducted in 2011. I do not accept, however, the submission that the weight given by the Tribunal was such as to overshadow all other considerations and render its decision manifestly unreasonable. The Tribunal comprehensively identified in its decision record the aspects of that site visit record, which if it accepted would result in an adverse decision to the applicant. It provided the applicant with an opportunity, both during the hearing and subsequently, to comment on or respond to that information and the issues it had identified arising from the information. The Tribunal considered and, in fact, accepted some of the

applicant's evidence (such as a joint bank account) submitted in support of her claim that she had a genuine and continuing relationship with the sponsor. The Tribunal made findings as to the applicant's and the sponsor's credibility, observing that their evidence was evasive and confusing. As was made clear by Kiefel J in *Ozbunbar v Minister for Immigration & Anor* (1998) 55 ALD 163 at 166-167, a determination of whether a marriage is genuine for the purposes of s.5F(2) will often turn on assessments of credibility:

"[A]s Branson J pointed out in Singh v Minister for Immigration and Ethnic Affairs (Fed C of A, Branson J, SG 8195, 29 April 1996, unreported) while there may be some objective facts relevant to, or consistent with, mutual commitment, often times it will require consideration of the parties' stated intentions. The true position will only be known to them. In these circumstances credibility will often assume importance. Reference to decided cases bears this out."

43. I agree with the first respondent's submission that it would appear that this ground is simply a plea for an impermissible merits review: *Minister for Immigration & Ethnic Affairs v Wu Shang Liang* (1996) 185 CLR 259 at 272
44. Consequently, the applicant's second round of judicial review is dismissed.

Ground 3 - breach of s.359A

45. The applicant's third ground for judicial review is:

The Tribunal has breached section 359A of the Migration Act in that evidence given by the Applicant for the "purposes of the application" is specifically excluded by s. 359A(4)."

46. Section 359A provides:

47. Information and invitation given in writing by Tribunal

48. (1) Subject to subsections (2) and (3), the Tribunal must:

49. (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a

*part of the reason, for affirming the decision that is under review;
and*

50. (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

51. (c) invite the applicant to comment on or respond to it.

52. (2) The information and invitation must be given to the applicant:

53. (a) except where paragraph (b) applies-by one of the methods specified in section 379A; or

54. (b) if the applicant is in immigration detention-by a method prescribed for the purposes of giving documents to such a person.

55. (3) The [Tribunal](#) is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.

56. (4) This section does not apply to information:

57. (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

58. (b) that the applicant gave for the purpose of the application for review; or

59. (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

60. (c) that is non-disclosable information.

61. In his oral submissions, Mr Fernandez clarified that the claimed breach of the s.359A arose in circumstances where by reason of s.359A(4)(ba)

there was no reason for the Tribunal to send to the applicant an invitation to comment on or respond to information which arose as a consequence of the site visit in 2011 (CB 217 to 224). It is true that the Tribunal was not obliged to issue the invitation to comment because the community information and the site visit were contained in the delegate's decision and a copy of that decision was provided to the Tribunal by the applicant with her review application. Accordingly, the information fell within the exception in s.359A(4)(b) of the Act.: *Minister for Immigration & Citizenship v Chamnum You* [2008] FCA 241.

62. However, the fact that the Tribunal sought comments on and responses to evidence which it considered would be the reason or part of the reason for affirming the decision under review in circumstances where it was not obliged to do so by the Act, does not give rise to jurisdictional error.

Conclusion

63. I am satisfied that, for the reasons set out above, the Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act this Court has no jurisdiction to interfere with that decision.
64. The first respondent has sought costs in the amount of \$5,800.
65. I will make orders that the application filed on 14 August 2013 be dismissed and that the applicant pay to the first respondent costs in the amount of \$5,800.

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Judge Jones

Associate:

Date: 20 August 2014